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IN THE

Supreme Court of the United States

October Term, 1964

No. 391

DEMOCRATIC COUNTY COMMITTEE OF PHILADELPHIA,
on Behalf of MICHAEL A. MUSMANNO,
Petitioner,

v.

COUNTY BOARD OF ELECTIONS OF
PHILADELPHIA COUNTY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LEVY ANDERSON
First Deputy City Solicitor
EDWARD G. BAUER, JR.
City Solicitor
Attorneys for the Respondent

703 City Hall Annex
Philadelphia, Pa. 19107

THE LEGAL INTELLIGENCER, 10 S. 37TH ST., PHILA. 19104

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OPINIONS BELOW

The Opinion of Court of Common Pleas No. 2 of Philadelphia County (pages 2a-9a of the Appendix to Petition) is unreported. The majority, concurring and dissenting opinions of the Supreme Court of Pennsylvania (pages 11a-51a of the Appendix to Petition) are unreported.

JURISDICTION

It is denied that the jurisdictional requirement has been met for the reason that neither at oral argument or in the briefs before Court of Common Pleas No. 2 of Philadelphia County or the Supreme Court of Pennsylvania did the petitioner raise or argue the question concerning the denial of any rights under the Constitution of the United States. This question was raised for the first time upon the peti-

tion and amended petition for reconsideration and/or re-argument filed by the petitioners in the Supreme Court of Pennsylvania, and that Court denied those petitions without opinion or passing upon the constitutional arguments. Further the petitioner has no standing to make complaint because neither it nor the candidate on whose behalf the petition is filed has been deprived of any constitutional right nor any right under any federal statute and no voter allegedly affected is a party to this action.

QUESTION PRESENTED

Where voting machines are used in a primary election in a state where cross-over voting is not permitted and where the candidates for nomination for each political party are listed in horizontal rows, with the first row labelled "REPUBLICAN," the second row labelled "DEMOCRATIC," the third row labelled "Special Election REPUBLICAN" (listing Republican candidates in a special election) and the fourth row labelled "Special Election DEMOCRATIC" (listing Democratic candidates in the special election), and the proper method of voting is by turning down the voting levers above the names of the respective candidates, may "votes" cast by turning down levers in the "Special Election REPUBLICAN" row over spaces where no candidates were listed be added to the vote for the Democratic candidates whose names appear in the Democratic row, where voters registered Republican and Non-Partisan could have and Republican voters did turn down the levers over the "Special Election REPUBLICAN" row? [1]

STATEMENT

This case arises out of the primary election held in the City of Philadelphia, Pennsylvania, on April 28, 1964 in

[1] The statutory provisions of the Pennsylvania Election Code relating to the use of voting machines are attached hereto and marked Exhibit "A".

which Jamestown voting machines were used. These machines carried the designation of the offices to be voted for in horizontal rows at the top of the machines and the candidates for each party were listed in adjoining horizontal rows immediately below with the name of each party at the far left.

The rows containing the candidates were arranged as follows;

ROW "A"—"REPUBLICAN" (listed the candidates for Republican primary nomination)

ROW "B"—"DEMOCRATIC" (listed the candidates for Democratic primary nomination)

In 13 Wards of the City these Jamestown voting machines were also used for special elections to fill vacancies in the offices of Representative in Congress and for Representative in the General Assembly in Pennsylvania. In those Wards the next two rows on the machine were set up as follows:

ROW "C"—"Special Election

REPUBLICAN" (No candidates' names were listed on this row except at the extreme right, where the names of the Republican candidates in the special elections appeared).

ROW "D"—"Special Election

DEMOCRATIC" (No candidates' names were listed on this row except at the extreme right, where the names of the Democratic candidates in the special elections appeared).

There were heavy black lines between the party labels in each row at the extreme left of the machine. Those lines included the voting levers at the top of each row and the names of the candidates below. Each party label carried a finger pointing to the levers at the top of each row as being the proper lever to pull in order to vote for a candidate in that row. In Rows "C" and "D" there were blank white cards over the spaces where the names of party candidates for nomination would ordinarily appear. Long black arrows were imprinted on these white cards, pointing to the candidates in the special election at the extreme right. The photograph appearing at page 22a of the Appendix to the petition correctly sets forth the appearance of the machine.

When a lever over the name of a candidate was turned down the end of the lever appeared directly upon the name of the candidate being voted for. When the lever at the top of Row "C" was turned down, the end of the lever was directly over the blank card in Row "C" except when voting for the candidates in the special election. The sample ballot posted outside each polling place indicated that the proper lever to be used in voting for a particular candidate was the one above the name of the candidate. The instructions contained on that sample ballot included the following:

"INSTRUCTIONS TO VOTER

"1st. Move the Red Handle of the Curtain Lever to the Right as far as it will go and leave it there (This will close the curtain around you and unlock the machine for voting)

"2nd. *Turn down a pointer over the name of each candidate* in your own party row* that you wish to vote for, from this position ▬▬ to this position ╲ and leave it there.

"(You will note on the Ballot that the "*Republican Party occupies the first horizontal row, the Democratic Party the second horizontal row. When voting your Party Row*, start at the left under the office of President of the United States and *turn down as many pointers as there are candidates to be elected for each office.* Do not be afraid of making a mistake or spoiling your ballot, as the machine will guard you against all such errors. *Just remember to turn down a pointer over the name of each candidate you wish to vote for*—the machine will do the rest. AT A GENERAL PRIMARY ELECTION YOU ARE PERMITTED TO VOTE ONLY FOR THE CANDIDATES IN YOUR OWN PARTY; THEREFORE, DO NOT ATTEMPT TO VOTE FOR CANDIDATES IN ANY OTHER PARTY, BECAUSE THE VOTING POINTERS ARE LOCKED AGAINST OPERATION.) (Exception—in case of any SPECIAL ELECTION, you may vote for any candidate of either Party.)

"3rd. After arranging your ticket, leave the pointers as they are, that is, turned down in a voting position; move the "Red Handle" to the left, as far as it will go and leave it there. This will automatically register a vote for each of the candidates for whom you voted, and at the same time will turn back the voting pointers and open the curtain.

REMEMBER

"That no votes are registered until the "Red Handle" is moved to the left to open the curtain. Therefore, as long as the curtain is closed around you, you can change your vote as many times as you desire by simply turning back the pointer *over the*

name of the candidate for whom you do not wish to vote, and *turning down the pointer over the name of the candidate* for whom you wish to vote. The machine will not allow you to vote for more than the proper number of candidates."

(emphasis supplied)
(*underscored in original)

The machines were adjustable by the election officials so electors who were registered Republican could vote in Row "A" (REPUBLICAN) but could not vote in Row "B" (DEMOCRATIC). Electors registered Democratic could vote in Row "B" but could not vote in Row "A". Voters registered Non-Partisan could not vote in Row "A" or "B" but were permitted to vote for candidates in the special election in Row "C" (Special Election REPUBLICAN) or in Row "D" (Special Election DEMOCRATIC) and were also permitted to vote on a referendum question appearing in the upper left portion of the machine above the names of the candidates in the primary election. On these voting machines part of a horizontal row could not be locked out. Hence electors registered Republican, Democratic and Non-Partisan who had not voted in Rows "A" or "B" could turn down the voting levers in all the columns of Rows "C" and "D" including the levers over the names of the candidates in the special election. The only way the voting levers in Row "C" and Row "D" could be rendered inoperative was by placing specially designed cover plates over the voting levers in those two rows. These plates could be secured only from the manufacturer of the machines.

Approximately 10 days before the primary election in question the petitioner requested that the County Board of Elections render the excess voting levers in Row "C" and Row "D" inoperative. Delivery of the machines to the polling places required at least three days. This left only about a week to secure the necessary cover plates. The County Board of Elections immediately contacted the manufacturer

of the machines who advised that they could not supply these cover plates in time.

Section 1216(c) of the Pennsylvania Election Code (25 Purdon's Statutes §3056(d)) provides as follows with respect to the manner of voting in primary elections in districts in which voting machines are used:

> "(d) At primaries, he shall vote for each candidate individually by operating the key, handle, pointer or knob, upon or adjacent to which the name of such candidate is placed. . . ."

Cross-over voting is not permitted in primary elections in Pennsylvania.

These voting machines have been used in the City of Philadelphia since 1930 and no difficulty had previously been encountered during the entire period although many special elections were held in the same manner.

After the canvass of the voting machines by the County Board of Elections the petitioner requested that the County Board of Elections count the "votes" in Row "C" and add the total of these votes to the respective candidates in Row "B". This the County Board of Elections, consisting of two Democrats and one Republican, refused to do. The petitioner then appealed to Court of Common Pleas of Philadelphia County which ordered the "vote" in Row "C" to be tabulated and a report thereon made to the court. (Exhibit "A", page 29 of Petition).

That count showed the following "votes" cast in Row "C" for the three Democratic senatorial candidates:

Blatt	2094
Roberts	181
Musmanno	3349
Total	5624

A substantial number of "votes" were also cast in Row "C" in columns in which there were no candidates in Row

"B" and in columns in which there were no candidates in either Row "A" or Row "B". Votes were cast in Row "C" in columns where the only candidates were in Row "A"—for "Delegates to Republican National Convention." A total of 41,499 votes were cast for the two Republican candidates in Row "A" and 67,534 votes were cast for the Democratic candidates in Row "B" respectively, for nomination to the office of United States Senator—a total of 109,033.

In the tabulation it was found that in some voting precincts one machine recorded votes in Row "A" but no votes in Row "B"; while the other voting machine in the same precinct recorded votes in Row "B" but none in Row "A". This was by reason of the fact that the first machine was used only for Republican electors, while the second machine was used only for Democratic electors. Nevertheless, both machines showed "votes" recorded in Row "C".

The Court of Common Pleas, in affirming the action of the County Board of Elections in refusing to count the "votes" in Row "C", declared that the voter must comply with the regulations for voting in order to have his vote counted. That court decided that since Republican, Democratic and Non-Partisans could and probably did vote in Row "C" and because it was not possible to determine who voted in Row "C", or the intent of the voter who voted in Row "C", those "votes" could not be counted.

The Supreme Court of Pennsylvania, in sustaining the County Board of Elections and the court below, relied upon the following facts:

a) Row "C" was marked "Special Election REPUBLICAN" with an arrow pointing to a Republican candidate in the special election,

b) Under Article 12(d) §1216 of the Election Code of Philadelphia, Act of June 3, 1937, P. L. 1333, 25 Purdon's Statutes §3056 providing as follows:

> "(d) At primaries, he shall vote for each candidate individually by operating the

> key, handle, pointer or knob, upon or adjacent to which the name of such candidate is placed."

the correct method of voting was by turning down the lever over a candidate's name.

c) If the voter were in any doubt he could have secured instructions in the proper method of voting.

d) The sample ballot informed the voter in clear language, together with a diagram, that in order to vote "turn down a pointer over the name of each candidate in your own party row."

e) That it would be a pure guess to determine whether the "votes" recorded in the blank spaces in Republican Row C represented, (1) protest votes, or (2) nonpartisan votes, or (3) Republican votes, or (4) Democratic votes, (5) or votes for Rovner [A Republican candidate in the Special Election], or (6) 'mistake' votes; but in any event they were illegally cast and were clearly and undoubtedly void votes!

The State Supreme Court ruled that under the Election Code of Pennsylvania and the instructions for the use of the Jamestown voting machines the only proper method for voting was to turn down the levers over the names of the candidates and that levers turned down anywhere else could not be counted.

That court stated that "Furthermore, appellant has not been deprived of any right ordained by the Constitution of the United States." [2] On August 20, 1964 the County Board of Elections certified the result of the election to the

[2] Appendix to Petition, 21a, erroneously quoted by the Petitioner at the bottom of page 8 of the Petition as "did not deprive these voters of any right ordered or guaranteed by the Constitution of the United States."

Pennsylvania Election Bureau, which on August 21, 1964 certified Genevieve Blatt as having been elected as the Democratic nominee for United States Senator from the Commonwealth of Pennsylvania.

ARGUMENT

Introduction

There is nothing in the present case warranting review by this Court on certiorari. All of the proceedings before the County Board of Elections, the Court of Common Pleas and the Supreme Court of Pennsylvania concerned issues arising under the Pennsylvania Election Code and whether or not the votes recorded in the Special Election REPUBLICAN Row "C" of the voting machine could, under state law, be properly counted.

The case does not involve any denial of the franchise to any prospective voter nor does it involve any fraud on the part of the County Board of Elections. At most it involves the failure of the County Board of Elections to anticipate that any voter would fail to follow the clear directions and instructions for voting in the light of the fact that such a problem had not arisen in over 30 years of experience with these voting machines. The petitioner complains about alleged "disfranchisement" of voters but no voter alleged to have been disfranchised is a party to this proceeding nor has any such voter attempted to intervene herein. Indeed no candidate is a party to this proceeding—only a committee of a political party. The petitioner did not raise the so-called constitutional issue before the County Board of Elections, before the Court of Common Pleas, or before the Pennsylvania Supreme Court until he filed his petition and amended petition for reconsideration and/or reargument; and there is no merit to that contention.

I. The Constitutional Issue Is Raised Too Late.

The petitioner by failing to raise the question until the filing of the petition for reconsideration and/or reargument is debarred from having the matter considered by this court. The general rule is that a constitutional question is urged too late if brought forth for the first time upon a petition for rehearing. *Great Northern Railway v. Sunburst Oil & Refining Company*, 287 U. S. 358, 53 S. Ct. 145, 77 L.ed. 360, 85 ALR 254 (1932); *Bloeth v. State of New York*, 368 U. S. 868, 82 S. Ct. 661, 7 L.ed. 2d 780 (1962). Of course, where the court below actually entertains such a petition and expressly decides the question then the jurisdiction of this court attaches. *Radio Station W O W v. Johnson*, 326 U. S. 120, 128, 65 S. Ct. 1475, 89 L.ed. 2092 (1945).

In the original opinion of the Supreme Court of Pennsylvania based upon the briefs and oral argument, in none of which was the constitutional argument presented, the statement appears at the end of the opinion "Furthermore, appellant has not been deprived of any right, ordained or guaranteed by the Constitution of the United States." (Appendix to Petition page 21a)

The opinion of the Supreme Court of Pennsylvania deals entirely with state law and does not purport to interpret any federal statute or provision of the Constitution of the United States. Indeed it does not even cite any decision of this court or any other federal court. The concurring opinion refers to the case of *Gray v. Sanders*, 372 U. S. 368, 83 S. Ct. 801, 9 L.ed. 2d 821 (1963), as not being authority for the proposition that votes invalidly cast must counted; and then points out that no claim was made that any voter was denied the right to vote and that no constitutional question was raised or argued in the appeal.

The Supreme Court of Pennsylvania dismissed both the original and the amended petition for reconsideration and/or reargument without any comment concerning the constitutional issues therein raised for the first time. (Appendix to Petition 52a-55a).

II. The Petitioner Has Not Been Deprived of Any Constitutional Right.

The petition complains of alleged disfranchisement of voters. However, no voter is a party to this action. In fact, no candidate is a party to this action. This action was brought by a political party committee. No provision of the Federal Constitution and no federal statute secures the right of a candidate to be nominated for the office of United States Senator. *United States v. Gradwell*, 243 U. S. 476, 488, 37 S. Ct. 407, 61 L.ed. 857 (1917). Also see *Johnson v. Stevenson*, (CA 7), 170 F. 2d 108, 111 (1948).

If a candidate for nomination has no right secured by federal law or the Constitution of the United States, a fortiori, neither has the committee of a political party. The right of a candidate to nomination, as clearly pointed out in *United States v. Gradwell, supra*, is under state law. That right under the law of the Commonwealth of Pennsylvania has been adjudicated by the Supreme Court of Pennsylvania adversely to Petitioner.

III. Elections to Nominate Candidates for United States Senator Are Governed by State Law.

Essentially, this matter is an election contest over which federal courts have no jurisdiction. See 28 U.S.C.A. §1344, which gives Federal district courts jurisdiction over election contests only if the sole question "arises out of the denial of the right to vote on account of race, color or previous condition of servitude" and limits that jurisdiction to the determination of the "rights of parties to office by reason of the denial of the right to vote". That section, however, excludes disputes involving the office of United States Senator. *Johnson v. Stevenson*, (CA 7) 170 F. 2d 108 (1948). Election contests involving the nomination for the office of United States Senator are specifically provided for under §1711 of the Pennsylvania Election Code of 1937, (25 Purdon's Statutes §3291); and §1731 of the Pennsylvania

Election Code (25 Purdon's Statutes, §3351), sets forth the procedure.

Under Article 1, §4, Clause 1 of the Constitution of the United States, it is provided that:

> *"The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof;* but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." (Emphasis supplied)

Hence, barring fraud or discrimination (whether by reason of color or by reason of improper apportionment) whether a so-called vote may be counted is a matter for determination under state law—at least where the Congress has not legislated thereon. *Newberry v. United States*, 256 U. S. 232, 41 S. Ct. 469, 65 L.ed. 913 (1921). The Petition has not pointed out any federal statute governing the issue involved in this case. Cases such as the right to vote without discrimination [*Smith v. Allwright*, 321 U. S. 649, 64 S. Ct. 757, 88 L.ed. 87 (1943)]; the weight to be given to a vote as in apportionment cases [*Westberry v. Sanders*, 376 U. S. 1, 84 S. Ct. 526, 11 L.ed. 2d 481 (1964)] and fraud in the count and certification of ballots [*United States v. Classic*, 313 U. S. 299, 62 S. Ct. 51, 85 L.ed. 1368 (1941)] are inapposite.

IV. Under Pennsylvania Law a Voter Who Has Cast His Vote in the Wrong Space Has Cast an Invalid Vote.

The only question is whether or not under the law of Pennsylvania the "votes" improperly cast in the Special Election REPUBLICAN Row "C" can properly be added to the votes properly cast for the candidates in DEMOCRATIC Row "B". The Supreme Court of Pennsylvania in considering that matter has decided that they could not be so counted—based on three major premises: (a) the

voters had voted improperly by turning down the lever in Special Election REPUBLICAN Row "C" over blank spaces, (b) their intention in doing so could not be determined, and (c) in any event those so-called "votes" were tainted because Republican and Non-Partisan electors could have and Republican electors did vote in that row.

In Pennsylvania cross-over voting is prohibited in primary elections under §1216(c) of the Pennsylvania Election Code of 1937 (25 Purdon's Statutes, §3056) providing as follows:

> "(c) At primaries, before a voter is admitted to the voting machine, it shall be adjusted by the election officer in charge thereof, so that such voter will only be able to vote for the candidates of the party in which he is registered and enrolled and for candidates for nonpartisan nomination, if any."

The voting machines in question were properly set up and operated to carry out the mandate of the statute. The instructions for the use of the machines contained in the sample ballots posted outside the polling places and the placement and design of the party labels on the machines carried out the directive of the statute. If the voter invalidated his ballot by ignoring the provisions of the statute and the instructions and directions for voting he has no one but himself to blame. As the opinion of the Supreme Court of Pennsylvania clearly points out, it was impossible to determine the intention of those who voted in Row "C", and it was also clear that many ineligible voters registered Republican had improperly voted in that row. Also see *Matter of Lester v. Gruner*, 205 (N. Y.) Misc. 67, 127 N.Y.S. 2d 272 (1953); *Leffel v. Brown*, 80 Abs. 273, 159 N.E. 2d 807 (Court of Common Pleas of Ohio, 1959).

The opinion of the Supreme Court of Pennsylvania interpreting the Pennsylvania Election Code is binding on this court. *National Association for the Advancement of Colored People v. Button*, 371 U. S. 415, 432, 83 S. Ct. 328,

9 L.ed. 2d 405, 417 (1963). The contention of the petitioner that this is contrary to prior decisions of the Supreme Court of Pennsylvania, which is not conceded, is nothing more than a request to this court to act as a super-Supreme Court of Pennsylvania in reviewing the extent to which that court should be bound by prior decisions in other cases.

The position apparently taken by the petitioner is that under the principle of "one person, one vote" every vote must be counted no matter how it violates the state law or the regulations covering voting and regardless of how difficult or impossible it is to determine the intention of the voter who has failed to cast his vote properly. Of necessity there must be circumstances under which a vote cannot be counted. For instance, if the voter fails to appear at the proper place at the proper time or fails to cast the ballot officially provided and properly marked, that vote is void. Similarly if in some other substantial manner a voter fails to comply with the statutory requirements or regulations for voting, that vote is void. The issue is not one of disfranchising any voter. Voters' loss of their votes because of their failure to vote in a lawful manner is not a matter of recent development. Such losses will undoubtedly continue so long as the right to vote exists.

The true issue is whether votes may be counted where (1) the electors failed to follow the statutory provisions and the instructions and directions for voting; (2) where it is impossible to determine the true intent of the electors; and (3) where the so-called votes are tainted because a very substantial portion were cast by persons who had no right to vote for Democratic candidates because they were registered in another political party. Rejecting votes cast under these circumstances does not and cannot violate any constitutional provision dealing with elections. The overwhelming majority of electors who have voted properly also have a right not to have their votes diluted by "votes" improperly cast. *Gray v. Sanders, supra*, 372 U. S. at page 380,

9 L.ed. 2d at page 830. There is nothing in the decision of the Supreme Court of Pennsylvania in interpreting the Pennsylvania Election Code that is contrary to any provision of the United States Constitution cited by the petitioner or otherwise.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

LEVY ANDERSON
First Deputy City Solicitor
EDWARD G. BAUER, JR.
City Solicitor
Counsel for Respondent

August , 1964

APPENDIX "A"

The statutory provisions of the Election Code relating to this case are the Act of June 3, 1937, P. L. 1333, Sec. 1107, 1111, 1216, 1711 (in part) and 1731, 25 Purdon's Statutes, Sec. 3007, 3011, 3056, 3291 (in part) and 3351. These provisions are as follows:

§ 1107

No voting machine shall, upon any examination or re-examination, be approved by the Secretary of the Commonwealth, or by any examiner appointed by him, unless it shall, at the time, satisfy the following requirements:

(a) It shall provide facilities for voting for such candidates as may be nominated, and upon such questions as may be submitted.

(b) It shall permit each voter, at other than primary elections, to vote a straight political party ticket in one operation, and, in one operation, to vote for all the candidates of one political party for presidential electors, and, in one operation, to vote for all the candidates of one political party for every office to be voted for, except those offices as to which he votes for individual candidates.

(c) It shall permit each voter, at other than primary elections, to vote a ticket selected from the nominees of any and all political parties, from the nominees of any and all political bodies, and from persons not in nomination.

(d) It shall permit each voter to vote, at any election, for any person and for any office for whom and for which he is lawfully entitled to vote, whether or not the name of such person appears upon a ballot label as a candidate for nomination or election, and to vote for as many persons for an office as he is entitled to vote for, and to vote for or against any question upon which he is entitled to vote.

(e) It shall preclude each voter from voting for any candidate, or upon any question, for whom or upon which he is not entitled to vote, and from voting for more persons for any office than he is entitled to vote for, and from voting for any candidate for the same office or upon any question more than once, except in districts and for offices where cumulative voting is authorized by law.

(f) It shall be capable of adjustment by election officers, so as to permit each voter at a primary election to vote only for the candidates for nonpartisan nomination, if any, and for the candidates seeking nomination by the political party in which he is registered and enrolled, if he is enrolled as a member of a political party, and so as to preclude him from voting for the candidates seeking nomination by any political party in which he is not enrolled.

(g) It shall permit each voter to deposit, write in, or affix upon receptacles or devices provided for the purpose, ballots containing the names of persons for whom he desires to vote, whose names do not appear upon the machine.

(h) It shall permit each voter to change his vote for any candidate, or upon any question appearing upon the ballot labels, up to the time he begins the final operation to register his vote, or indicates or expresses his intention to register his vote.

(i) It shall permit and require voting in absolute secrecy, and shall be so constructed that no person can see or know for whom any other elector has voted or is voting, save a voter whom he has assisted or is assisting in voting, as prescribed by law.

(j) It shall have voting devices for separate candidates and questions, which shall be arranged in separate parallel rows or columns, so that, at any primary election, one or more adjacent rows or columns may be assigned to the candidates of a party, and shall have parallel office columns or rows transverse thereto.

(k) It shall have a counter, or other device, the register of which is visible from the outside of the machine, which shall show during any period of voting the total number of voters who have operated the machine during said period of voting.

(l) It shall have a protective counter, or other device, the register of which cannot be reset, which shall record the cumulative total number of movements of the operating mechanism.

(m) It shall be provided with a lock or locks, by the use of which, immediately after the polls are closed, or the operation of the machine for an election is completed, all movement of the registering mechanism is absolutely prevented.

(n) It shall be provided with a screen, hood or curtain, which shall conceal the actions of the voter while voting.

(o) It shall be constructed of material of good quality, in a neat and workmanlike manner.

(p) It shall, when properly operated, register or record correctly and accurately every vote cast.

(q) It shall be so constructed that a voter may readily learn the method of operating it.

(r) It shall be safely transportable.

(s) It shall be so constructed and controlled that, during the progress of voting, it shall preclude every person from seeing or knowing the number of votes registered for any candidate, and from tampering with any of the registering mechanism.

(t) If it is of a type equipped with mechanism for printing paper proof sheets, and not requiring the counters to be made visible in order to canvass the votes recorded on the machine, the door, or other device, concealing such counters, or keeping the same concealed, may be equipped

with a lock or locks, requiring the simultaneous use of three separate and substantially different keys to open or operate the same.

§ 1111

(a) The county election board of each county shall cause the proper ballot labels to be placed on each voting machine which is to be used in any election district within such county; and shall cause each machine to be placed in proper order for voting; shall examine each machine before it is sent out to a polling place; shall see that each registering counter, except the protective counter, on each machine is set at zero (000); shall lock each machine so that the counting machinery cannot be operated, and shall seal each machine with a numbered seal. The county election board or their duly authorized agent shall adjust each machine to be used at a primary election, so that the election officers may lock it on primary election day, in such a way that each voter can vote only for the candidates for nonpartisan nomination, if any, and for the candidates seeking nomination by the political party in which he is enrolled, if he is enrolled as a member of a political party, and so that no voter can vote for the candidates seeking nomination by any political party in which he is not enrolled.

(b) The county election board shall appoint one custodian of voting machines, and such deputy custodians as may be necessary, whose duty it shall be to prepare the machines to be used in the county at the elections to be held therein. Each custodian and deputy custodian shall receive from the county, for each day he is actually employed under the provisions of this act, such compensation as shall be fixed by the county election board, but not less than five dollars ($5.00) per day. Such custodian shall, under the direction of the county election board, have charge of and represent the county election board during the preparation of the voting machines as required by this act, and he and

the deputy custodians, whose duty it shall be to assist him in the discharge of his duties, shall serve at the pleasure of the county election board. Each custodian shall take the constitutional oath of office, which shall be filed with the county election board.

(c) On or before the fortieth day preceding an election, the county election board shall mail to the chairman of the county committee of each political party, which shall be entitled under existing laws to participate in primary elections within the county, and to the chairman or presiding officer of any organization of citizens within the county having as its purpose or among its purposes the investigation or prosecution of election frauds, which has registered its name and address, and the names of its principal officers with the county election board at least fifty (50) days before such election, a written notice stating the times when and the place or places where preparation of the machines for use in the several election districts in the county will be started. One representative of each of such political parties, certified by the respective chairmen of the county committees of such parties, and one representative of each such organization of citizens, certified by the respective chairmen or presiding officers of such organizations, shall be entitled to be present, during the preparation of the machines, and to see that the machines are properly prepared and are placed in proper condition and order for use: Provided, however, That such repesentatives shall not interfere with preparation of the machines, and the county board may make such reasonable rules and regulations governing the conduct of such representatives.

(d) The custodian and deputy custodians of voting machines shall make a certificate, in writing, which each shall sign, and request each representative of a party or a citizens organization as aforesaid, present at the preparation of the machine to attest, and which shall be filed with the county election board, stating — (1) the identifying

number or other designation of the voting machine; (2) that each registering counter of the machine was set at zero (000); (3) the number registered on the protective counter or other device of the machine; and (4) the number on the seal with which the machine is sealed.

(e) No member of the county election board, nor custodian, nor other employee of the county election board, shall, in any way, prevent free access to and examination of all voting machines, which are to be used at the election, by any of the duly appointed representatives aforesaid; and the county election board and their employes shall afford to each such representative every facility for the examination of all registering counters, protective counters, and public counters of each and every voting machine.

(f) The county election board shall furnish, at the expense of the county, all ballot labels, forms of certificates, returns, and other papers and supplies, required under the provisions of this act, all of which shall be in the form, and according to the specifications, prescribed, from time to time, by the Secretary of the Commonwealth.

§1216

(a) In districts in which voting machines are used, the election officers shall, with the aid of the diagrams authorized by this act and the mechanically operated model, instruct each elector before he enters the voting machine booth regarding the operation of the machine, and shall give the elector opportunity personally to operate the model.

(b) If any voter, after entering the voting machine booth and before the closing of such booth, shall ask for further instructions concerning the manner of voting, any one of the election officers may give him such instructions, but no person giving a voter such instructions shall in any manner request, suggest or seek to persuade or induce any such elector to vote any particular ticket or for any partic-

ular candidate or for or against any particular question. After giving such instructions, and before the elector closes the booth or votes, the election officer shall retire, and the elector shall forthwith vote.

(c) At primaries, before a voter is admitted to the voting machine, it shall be adjusted by the election officer in charge thereof, so that such voter will only be able to vote for the candidates of the party in which he is registered and enrolled and for candidates for nonpartisan nomination, if any.

(d) At primaries, he shall vote for each candidate individually by operating the key, handle, pointer or knob, upon or adjacent to which the name of such candidate is placed. At elections, he may vote for each candidate individually by operating the key, handle, pointer or knob, upon or adjacent to which the names of candidates of his choice are placed, or he may vote a straight political party ticket in one operation by operating the straight political party lever of the political party or political body of his choice, if such machine has thereon a separate lever for all the candidates of the political body. He may also, after having operated the straight party lever, and before recording his vote, cancel the vote for any candidate of such political party or political body by replacing the individual key, handle, pointer or knob of such candidate, and may thereupon vote for a candidate of another party, or political body for the same office by operating the key, handle, pointer or knob, upon or adjacent to which the name of such candidate appears. In the case of a question submitted to the vote of the electors, the elector shall operate the key, handle, pointer or knob corresponding to the answer which he desires to give.

(e) A voter may, at any primary or election, vote for any person for any office, for which office his name does not appear upon the voting machine as a candidate, by an irregular ballot containing the name of such person deposited,

written or affixed in or upon the appropriate receptacle or device provided in or on the machine for that purpose, and in no other manner. Where two or more persons are to be elected to the same office, and the name of each candidate is placed upon or adjacent to a separate key, handle, pointer or knob, and the voting machine requires that all irregular ballots voted for that office be deposited, written or affixed in or upon a single receptacle or device, an elector may vote in or by such receptacle or device for one or more persons whose names do not appear upon the machine, with or without the names of one or more persons whose names do so appear. With these exceptions, no irregular ballot shall be cast on a voting machine for any person for any office, whose name appears on the machine as a candidate for that office, and any ballot so cast shall be void and not counted.

(f) At any general election at which presidential electors are to be chosen, each elector shall be permitted to vote by one operation for all the presidential electors of a political party or political body. For each party or body nominating presidential electors, a ballot label shall be provided containing only the words "Presidential Electors," preceded by the names of the party or body and followed by the names of the candidates thereof for the office of President and Vice-President, and the corresponding counter or registering device shall register votes cast for said electors when thus voted for collectively. If any elector desires to vote a ticket for presidential electors made up of the names of persons nominated by different parties or bodies, or partially of names of persons so in nomination and partially of names of persons not in nomination by any party or body, or wholly of names of persons not in nomination by any party or body, he may write or deposit a paper ballot prepared by himself in the receptacle provided in or on the machine for the purpose. The machine shall be so constructed that it will not be possible for any one voter to vote a straight party ticket for presidential electors and at the same time to deposit a ballot for presidential electors in a receptacle as

hereinabove provided. When the votes for presidential electors are counted, the votes appearing upon the counter or registering device corresponding to the ballot label containing the names of the candidates for President and Vice-President of any party or body shall be counted as votes for each of the candidates for presidential elector of such party or body, and thereupon all candidates for presidential elector shall be credited, in addition, with the votes cast for them upon the ballots deposited in the machine, as hereinabove provided.

(g) As soon as the elector has adjusted the voting machine so that it will record his choice for the various candidates to be voted for, and his answers to the various questions submitted, he shall operate the recording mechanism, and forthwith leave the voting machine booth.

§1711

The several classes of nominations at primaries and elections of public officers which may be contested in this Commonwealth are hereby distinguished and designated as follows, to wit:

* * * * *

Class II. Nominations and elections of electors of President and Vice-President of the United States and all offices of this Commonwealth, including Judges of the Supreme and Superior Courts (except Governor and Lieutenant Governor), who now are or hereafter shall be required to be nominated or elected by the electors of the State at large, and nominations of United States Senators.

* * * * *

§1731

Cases of the second class shall be tried and determined by the court of common pleas of Dauphin County, upon petition of at least one hundred electors as hereinafter provided.

For the purpose of hearing and determining the complaint in the petition in such cases, the court of common pleas of Dauphin County shall notify to sit with it on the hearing of such complaint, two president judges, learned in the law, residing nearest to the courthouse of the said judicial district, and the judges so notified shall appear and sit as part of the said court on the hearing, trial and determination of such petition.